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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re DEVIN F., a Person Coming Under the Juvenile Court Law.	B233015 (Los Angeles County Super. Ct. No. CK48734)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ROBERT F., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Tim Saito, Judge. Reversed.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Melinda White-Svec, Deputy County Counsel, for Plaintiff and Respondent.

Robert F., the biological father of Devin F., appeals from a juvenile court order denying him reunification services pursuant to Welfare and Institutions Code section 361.5, subdivision (a).[1] We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Devin was born in late January 2011 with a positive toxicology screen for amphetamines. M.W. (Mother), the mother of Devin and his four-year-old half-sister Alice G.,[2] also tested positive for amphetamines and opiates. As a result, the Los Angeles County Department of Children and Family Services (Department) filed a petition on February 4, 2011 to declare Devin and Alice dependent children of the juvenile court under section 300, subdivisions (a), (b) and (g), alleging serious physical harm, failure to protect and failure to provide support as a result of Mother and Robert's use of illicit drugs and history of engaging in violent altercations in Alice's presence.

In its report for the detention hearing, the Department stated Mother, then 30 years old, admitted to a Department social worker she had a history of substance abuse and had used methamphetamine before giving birth to Devin because she was depressed.[3] Mother also told the social worker Robert, whom she had known for two years, was incarcerated for possession of Vicodin with an expected release date of December 2011. She disclosed the two had used methamphetamine together and described their relationship as "up and down like everybody else's."

At the detention hearing on February 4, 2011 Mother told the juvenile court she believed Robert was Devin's father, even though Robert was not named on the birth

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1 Statutory references are to the Welfare and Institutions Code.

2 Mother, Alice and Alice's alleged father, Kenneth L., are not parties to this appeal. Consequently, our recitation of the facts will generally omit discussion of Alice and Kenneth.

3 Mother claimed she had been sober for several years after losing custody of another child, Christian G., to her parents. She relapsed prior to giving birth to Alice, but voluntarily entered a sober living home. Mother contended she had only used methamphetamine sporadically since then.

certificate and had not been present at the birth. The court found Robert was an alleged father, scheduled an arraignment hearing for him on March 4, 2011 and ordered him brought to the next hearing.

On March 4, 2011 Robert submitted a form JV-505, "Statement Regarding Parentage," stating he believed he was Devin's biological father because he was living with Mother when Devin was conceived. Robert also stated he loved Devin and wanted to care for him. At the arraignment hearing on that same day Robert's counsel explained, "Father was incarcerated . . . a month into the pregnancy. So he's holding himself out as the father, but he's not on the birth certificate and he hasn't signed the voluntary declaration of paternity. It is his intent to do so." At the Department's request, the court postponed making any changed finding regarding Robert's parental status because Mother was not present in court.

At a hearing on March 7, 2011 the court found Robert was Devin's biological father after questioning Mother. The court scheduled a pretrial resolution conference for March 10, 2011 and an adjudication for April 14, 2011.

According to a Department report prepared for the pretrial resolution conference, Robert had received a three-year prison term for possession of a controlled substance. The term began on September 1, 2010, and his expected release date was June 24, 2012. At that time Robert was not participating in any programs, such as a substance abuse program, that would address case-related issues. The Department recommended no family reunification services be provided to Robert "pursuant to [§ 361.5, subd. (e)(1)[4]] in

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4 Section 365.1, subdivision (e)(1), provides in part, "If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration or institutionalization within the reunification time limitations described in subdivision (a), and any other appropriate factors."

that he is currently incarcerated with the earliest release time of 2012 which will exhaust the family reunification time frame. Further, the court made a finding that the father is alleged and therefore [§ 361.5, subd. (a)] is also applicable."

With respect to Mother, the Department recommended no reunification services be provided because of her history of unresolved substance abuse, criminal arrests and failure to reunify with one of Devin's half-siblings. Mother, however, had enrolled in a six-month outpatient program, including individual counseling, group counseling and drug and alcohol counseling, and stated she was willing to comply with the Department and court orders to reunify with her children.

At the March 10, 2011 pretrial resolution conference the court found the jurisdictional issues as to Mother had been resolved, sustained the amended counts as to her pursuant to the terms of a mediation agreement and set the matter for an April 14, 2011 contested disposition hearing regarding reunification services. Jurisdiction and disposition hearings for Robert were continued to the same date. The court ordered a supplemental report from the Department addressing Robert's length of incarceration and release date since it had been suggested at the March 10, 2011 hearing he would be released at the end of that summer.

In a supplemental report prepared April 13, 2011 the Department stated Robert was on a waiting list to participate in a fire camp academy, which could reduce his sentence if successfully completed. However, because "it will take up to 3-weeks after completing the academy for a 'Legal Analyst' to review the case and determine a new sentence term[,] . . . [Robert's] sentence remains a 3 year term." The Department maintained its recommendation Robert not be provided with family reunification services pursuant to section 361.5, subdivision (e)(1), and proposed he file a section 388 petition after his release. The Department continued to recommend Mother not be provided reunification services even though attending parenting classes demonstrated a good attitude and she had only negative drug test results.

At the April 14, 2011 hearing the court sustained the petition as amended as to Robert[5] and declared Devin and Alice dependent children of the court under section 300, subdivisions (b) and (g). The Department recommended no reunification services be provided to Robert because he was "merely an alleged father" notwithstanding the Department report had recommended Robert not be provided family reunification services pursuant to section 361, subdivision (e)(1). In response to the court's inquiry whether the Department was "withdrawing its basis on page 6 of today's report," counsel for the Department explained that recommendation was erroneous: "The worker isn't an attorney, so she didn't know what basis to put down for him not getting reunification services. It's because he's alleged."

Robert argued reunification services should be provided because it would be in the best interest of Devin, Robert and Mother, who all intended to live together as a family: "Mother and Father have an extensive history together. No one debates that he is the father of this child. He has not been named presumed father yet, in part because he was not on the birth certificate, because he was incarcerated when the child was born. He claims this child as his own. He is doing everything he can as detailed in today's report to get into fire camp which will shorten his term, so that he will get [out] in time in order to benefit from family reunification services. . . . I believe that the family intends to live as a family at one point. I note that Mother is shaking her head yes to that. And being that they do intend to live together as a family, I think it would benefit, not just the child, but the father to learn how to be an appropriate father to address his substance abuse issues. And to address his parental responsibilities in counseling." After further argument from the Department and counsel for Devin, who joined the Department's argument Robert was not entitled to reunification services because he was merely an

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5 Count b-3 as amended provides, "The child Devin [F.'s] father, Robert [F.], has a history of illicit drug use, which . . . includes methamphetamine, but is not limited to methamphetamine, which renders the father incapable of providing regular care for the child. The father's illicit drug use endangers the child's physical and emotional health and safety and places the child at risk of harm."

alleged father, the court found, "With regard to [Robert], the court maintains that he is an alleged father in this case. The court is not going to grant reunification services."

With respect to Mother, although the Department continued to recommend she not be provided reunification services, the court found it was in Devin's best interest to grant Mother six months of additional services because she was "in full compliance with her case plan, is undergoing programs and has been testing clean." (See § 361.5, subd. (c), 2d para.)

DISCUSSION

Family reunification services play a critical role in dependency proceedings. (*In re Alanna A.* (2005) 135 Cal.App.4th 555, 563.) However, only the child's mother and a statutorily presumed father (or the child's guardians) are entitled to family reunification services. (See § 361.5, subd. (a);[6] *In re Zacharia D.* (1993) 6 Cal.4th 435, 451 [only a presumed father is entitled to custody and reunification services].)[7] The juvenile court has the discretion to order family reunification services to the biological father if it finds that services will benefit the child. (§ 361.5, subd. (a).) An alleged father is entitled only to notice of the proceedings and the opportunity to appear and attempt to change his paternity status. (*In re O.S.* (2002) 102 Cal.App.4th 1402, 1408.)

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6 Section 361.5, subdivsion (a), provides, "Except as provided in subdivision (b), . . . whenever a child is removed from a parent's or guardian's custody, the juvenile court shall order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father or guardians. Upon a finding and declaration of paternity by the juvenile court or proof of a prior declaration of paternity by any court of competent jurisdiction, the juvenile court may order services for the child and the biological father, if the court determines that the services will benefit the child."

7 "There are three types of fathers in juvenile dependency law: presumed, biological, and alleged. [Citation.] A presumed father is a man who meets one or more specified criteria in [Family Code] section 7611. A biological father is a man whose paternity has been established, but who has not shown he is the child's presumed father. An alleged father . . . is a man who has not established biological paternity or presumed father status. [Citation.] These categories are meant 'to distinguish between those fathers who have entered into some familial relationship with the mother and child and those who have not.'" (*In re P.A.* (2011) 198 Cal.App.4th 974, 979-980.)

The juvenile court has broad discretion in deciding whether to order services for a biological parent. (See *In re William B.* (2008) 163 Cal.App.4th 1220, 1229.) We will not disturb its decision unless the court exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Tanis H.* (1997) 59 Cal.App.4th 1218, 1226-1227.) However, "a trial court's failure to exercise discretion is itself an abuse of discretion." (*In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515.)

In the instant case, the court found Robert was Devin's biological father at the March 7, 2011 hearing after considering the statement regarding parentage Robert filed, representations made by Robert's counsel and Mother's unequivocal testimony Robert was Devin's biological father. This was sufficient. (See Cal. Rules of Court, rule 5.635(e)(3) ["court may make its determination of parentage or nonparentage based on the testimony, declarations, or statements of the alleged parents"]; *In re J.H.* (2011) 198 Cal.App.4th 635, 648 ["The juvenile court is not required to order genetic testing at the request of a party. Under rule 5.635(e)(2), the juvenile court must make a parentage determination and may order genetic tests to make the determination. But it may also make the parentage determination based on the 'testimony, declarations, or statements of the alleged parents.'"].) Nevertheless, perhaps persuaded by the Department's erroneous statement the court had only found Robert to be an alleged father, the court denied him reunification services on that basis and did not evaluate whether it would have benefitted Devin to provide Robert with reunification services. This failure to exercise discretion was an abuse of discretion.[8]

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8 On appeal the Department acknowledges the juvenile court found Robert was Devin's biological father and then asserts, because Robert had not improved his paternal status from biological to presumed, "[h]e thus reverted to the status of an alleged father." The only authority cited for this rather curious proposition is footnote 15 on page 449 of *In re Zacharia D., supra,* 6 Cal.4th 435, which simply defines the terms "biological or natural father" and "alleged father" and says nothing at all remotely suggesting a biological father can somehow lose that status if he fails to establish he is a presumed father.

DISPOSITION

The order is reversed, and the matter remanded for further proceedings not inconsistent with this opinion. In deciding on remand whether reunification services for Robert would benefit Devin, the juvenile court is to consider both Devin's and Robert's current circumstances.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.